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ALAM VENTURE SDN BHD & ANOR v. ABDUL AZIZ ABDUL MAJID & ORS

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ABDULL HAMID EMBONG FCJ
B HASAN LAH FCJ
ZALEHA ZAHARI FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 01(f)-45-10-2013(C)]
24 NOVEMBER 2014

C

LABOUR LAW: *Collective agreement – Breach of – Termination of employment – Whether with just cause and excuse – Hotel business transferred from second appellant to first appellant – Whether change of ownership within meaning of art. 2.4 of collective agreement – Whether first appellant contracted to assume rights* D *and liabilities of second appellant – Whether employees should continue to remain in service to enjoy same entitlements contracted for – Whether first appellant successor, assignee or transferee of second appellant in context of s. 17(1)(a) Industrial Relations Act 1967 – Whether parties bound by collective agreement*

LABOUR LAW: *Employment – Termination of employment – Whether with just* E *cause and excuse – Collective agreement – Breach of – Hotel business transferred from second appellant to first appellant – Whether change of ownership within meaning of art. 2.4 of collective agreement – Whether first appellant contracted to assume rights and liabilities of second appellant – Whether employees should continue to remain in service to enjoy same entitlements contracted for – Whether* F *first appellant successor, assignee or transferee of second appellant in context of s. 17(1)(a) Industrial Relations Act 1967 – Whether parties bound by collective agreement*

The second appellant was the registered owner of the lands in Telok Chempedak Kuantan where the hotel, Hyatt Regency, was situated. The first G appellant was the current registered owner of the said lands having purchased them together with the buildings thereon and all the assets from the second appellant. The respondents were former employees of the second appellant, who claimed to have been dismissed without just cause and excuse. The respondents were represented by their Union ('the Union'). On 15 November H 2005, the Union was informed that due to the second appellant's financial position, it was no longer a feasible option for the second appellant to continue its hotel operations and to remain in the hotel industry. It had no alternative but to sell its assets and to carry out a termination of employment exercise. The respondents were in due course served with notices of I termination. Dissatisfied, the respondents took their case to the Industrial Court claiming that they were dismissed without just cause and excuse, in breach of the collective agreement entered into between the second appellant and the Union. In their claims, they sought to be reinstated without any loss

of wages, allowances or privileges. The Industrial Court dismissed the respondents' claims against the appellants and held that the second appellant had terminated the services of the respondents with just cause and excuse. Aggrieved, the respondents applied to the High Court for judicial review pursuant to O. 53 Rules of the High Court 1980 ('RHC') seeking an order of *certiorari* to quash the award of the Industrial Court. The High Court dismissed the respondents' application for judicial review with costs. On appeal, the Court of Appeal allowed their appeal with costs, quashed the award of the Industrial Court, set aside the decision of the High Court and ordered that compensation and backwages be paid to the respondents, *in lieu* of reinstatement. The Court of Appeal made a further order that the matter be remitted to the Industrial Court for assessment of compensation and backwages to be paid by the first appellant. The appellants then applied for leave to appeal to this court against the decision of the Court of Appeal. Leave was granted to the appellants on the following questions of law (i) whether an article of a collective agreement that sought to result in the automatic transfer of employees from the present employer to another non-party of the collective agreement, without the consent of the non-party of the collective agreement and/or employees, was enforceable under the Industrial Relations Act 1967 ('the Act') and/or industrial law; and (ii) whether s. 17 of the Act applied only to ensure the continuity of the terms and conditions of a collective agreement in the context of successors, assignees or transferees or could it apply to mandate a purchaser of asset and/or business to continue to employ the former employees of the asset/business seller.

Held (dismissing appeal with costs)
Per Abu Samah Nordin FCJ delivering the judgment of the court:

(1) There was a change of ownership of the hotel, within the meaning of art. 2.4 of the collective agreement pursuant to the sale of the hotel by the second appellant to the first appellant. As a result of the sale, the hotel business, which was the core business of the second appellant, was transferred and taken over by the first appellant. Article 2.4 clearly states that in the event of a change of ownership, the collective agreement remained valid and shall continue to apply and that all the employees shall continue to remain in service to enjoy the same entitlements as contracted for. The hotel did not cease operations after being taken over by the first appellant. To ensure continuity of the hotel business, the first appellant entered into a new management agreement with Hyatt Hotel Management Limited on 27 January 2006, which was one day before the second appellant terminated its management agreement. (para 33)

(2) It is provided in cl. 12(a) of the sale and purchase agreement ('SPA') between the first and second appellant that the second appellant shall give vacant possession of the property to the first appellant on the

completion date and in that event the purchaser shall take over the whole hotel operations and shall bear all expenses and enjoy profits from the completion date. The hotel business of the second appellant was transferred and taken over by the first appellant as a going concern. In a transfer as a going concern, the business remained the same but in different hands. The High Court construed art. 2.4 of the collective agreement in its literal meaning when it held that the second appellant had not changed ownership and continued to exist by the same name even after selling its property to the first appellant. It did not consider the change of ownership of the hotel as a change of ownership within the meaning of art. 2.4 of the collective agreement. Such an interpretation of art. 2.4 would not be in accord with s. 30(5) of the Act. The respondents, who were employees of the second appellant, were actually employed to work at the hotel which had been taken over by the first appellant. By cl. 9 of the SPA, the first appellant had contracted to assume the rights and liabilities of the second appellant. There was a change of ownership within the meaning of art. 2.4 of the collective agreement. Thus, the parties were bound by it. (para 34)

(3) In the instant appeal, there was no doubt that the first appellant was the successor, assignee or transferee of the second appellant in the context of s. 17(1)(a) of the Act. Thus, the first appellant's contention that it was not bound by the collective agreement was without any merit. In any event and independently of s. 17(1) of the Act, the first appellant which had agreed by cl. 9 of the SPA to assume the rights and liabilities of the second appellant could not now say that it was not bound by the collective agreement. (paras 40 & 42)

Bahasa Malaysia *Translation Of Headnotes*

Perayu kedua adalah pemilik berdaftar tanah di Telok Chempedak Kuantan di mana terletaknya sebuah hotel iaitu Hyatt Regency. Perayu pertama adalah pemilik berdaftar semasa tanah tersebut setelah membelinya berserta dengan kesemua bangunan dan segala aset daripada perayu kedua. Responden-responden adalah bekas pekerja perayu kedua, yang mendakwa bahawa mereka telah dibuang kerja tanpa sebab dan alasan yang munasabah. Responden-responden diwakili oleh Kesatuan mereka ('Kesatuan'). Pada 15 November 2005, Kesatuan telah dimaklumkan bahawa perayu kedua tidak layak melaksanakan opsyen meneruskan operasi hotelnya dan untuk mengekalkan dirinya dalam industri hotel disebabkan kedudukan kewangannya. Ia tidak mempunyai alternatif lain tetapi untuk menjual aset-asetnya dan menjalankan tindakan penamatan pekerjaan pekerja-pekerja. Responden-responden diserahkan notis penamatan kerja. Tidak berpuas hati, responden-responden membawa kes mereka ke Mahkamah Perusahaan dengan dakwaan bahawa mereka telah dibuang kerja tanpa sebab dan alasan yang munasabah, iaitu satu pelanggaran perjanjian kolektif yang dimasuki oleh perayu kedua dan Kesatuan. Dalam dakwaan mereka, responden-

responden memohon untuk dikembalikan ke jawatan asal mereka tanpa apa-apa kehilangan gaji, elaun dan hak-hak istimewa. Mahkamah Perusahaan menolak tuntutan responden-responden terhadap perayu-perayu dan memutuskan bahawa perayu kedua telah menamatkan pekerjaan responden-responden dengan sebab dan alasan yang munasabah. Terkilan, responden-responden memohon kepada Mahkamah Tinggi untuk semakan kehakiman di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') memohon perintah *certiorari* untuk membatalkan award yang diberikan oleh Mahkamah Perusahaan. Mahkamah Tinggi menolak permohonan responden-responden untuk semakan kehakiman dengan kos. Atas rayuan, Mahkamah Rayuan membenarkan rayuan dengan kos, membatalkan award Mahkamah Perusahaan, mengenepikan keputusan Mahkamah Tinggi dan memerintahkan ganti rugi dan gaji tertunggak dibayar ke responden-responden, sebagai ganti pengembalian jawatan. Mahkamah Rayuan membuat perintah seterusnya bahawa perkara ini harus diremitkan kepada Mahkamah Perusahaan bagi taksiran ganti rugi dan gaji tertunggak untuk dibayar oleh perayu pertama. Perayu-perayu kemudiannya memohon kebenaran untuk merayu kepada mahkamah ini terhadap keputusan Mahkamah Rayuan. Kebenaran telah diberikan kepada perayu-perayu atas persoalan undang-undang berikut (i) sama ada artikel perjanjian kolektif yang berusaha untuk mengakibatkan pemindahan automatik pekerja-pekerja daripada majikan semasa kepada pihak yang bukan dalam perjanjian kolektif, tanpa kebenaran pihak yang bukan dalam perjanjian kolektif dan/atau majikan, boleh dikuatkuasakan di bawah Akta Perhubungan Perusahaan 1967 ('Akta') dan/atau Undang-Undang Perusahaan; dan (ii) sama ada s. 17 Akta hanya diguna pakai untuk memastikan kesinambungan terma dan syarat-syarat perjanjian kolektif dalam konteks pengganti, pemegang serah hak atau penerima pindahan atau ia boleh diguna pakai untuk mandat seorang pembeli aset dan/atau perniagaan untuk mengambil bekas pekerja-pekerja aset/penjual perniagaan.

Diputuskan (menolak rayuan dengan kos)
Oleh Abu Samah Nordin HMP menyampaikan penghakiman mahkamah:

(1) Terdapat pertukaran hak milik hotel dalam maksud art. 2.4 perjanjian kolektif menurut penjualan hotel oleh perayu kedua kepada perayu pertama. Akibat penjualan itu, perniagaan hotel, iaitu perniagaan teras perayu kedua, telah dipindah milik dan diambil alih oleh perayu pertama. Artikel 2.4 dengan jelasnya menyatakan bahawa apabila berlakunya pertukaran hak milik, perjanjian kolektif adalah sah dan akan terus diguna pakai dan bahawa semua pekerja-pekerja akan terus kekal bekerja dan menikmati segala hak yang sama seperti yang terdapat dalam kontrak. Hotel tidak berhenti operasi selepas diambil alih oleh perayu pertama. Untuk memastikan kesinambungan perniagaan hotel, perayu pertama telah memasuki satu perjanjian pengurusan baru dengan Hyatt Hotel Management Limited pada 27 Januari 2006, iaitu sehari sebelum perayu kedua membatalkan perjanjian pengurusannya.

(2) Diperuntukkan dalam kl. 12(a) perjanjian jual beli ('PJB') antara perayu pertama dan perayu kedua bahawa perayu kedua akan memberikan milikan kosong tanah berkenaan kepada perayu pertama pada tarikh penyelesaian dan dalam acara itu pembeli akan mengambil alih operasi hotel secara keseluruhannya dan akan menanggung segala perbelanjaan dan menikmati keuntungan dari tarikh penyelesaian. Perniagaan hotel perayu kedua telah dipindah milik dan diambil alih oleh perayu pertama sebagai usaha berterusan. Dalam milikan sebagai usaha berterusan, perniagaan kekal sama tetapi berada dalam tangan yang berlainan. Mahkamah Tinggi telah mentafsirkan art. 2.4 perjanjian kolektif dalam makna harfiahnya apabila ia memutuskan bahawa perayu kedua tidak bertukar hak milik dan terus wujud dengan nama yang sama walaupun telah menjual tanahnya kepada perayu pertama. Ia tidak mempertimbangkan penukaran hak milik hotel itu sebagai penukaran hak milik dalam maksud art. 2.4 perjanjian kolektif. Tafsiran sedemikian tidak selaras dengan s. 30(5) Akta. Responden-responden, sebagai pekerja-pekerja perayu kedua, sebenarnya digunakan untuk bekerja di hotel yang telah diambil alih oleh perayu pertama. Melalui kl. 9 PJB, perayu pertama telah secara kontrak mengambil alih hak dan liabiliti perayu kedua. Terdapat pertukaran hak milik dalam maksud art. 2.4 perjanjian kolektif. Oleh itu, pihak-pihak adalah terikat.

(3) Dalam rayuan ini, tidak ada sebarang syak bahawa perayu pertama adalah pengganti, pemegang serah hak atau penerima pindahan bagi perayu kedua dalam konteks s. 17(1)(a) Akta. Oleh itu, hujahan perayu pertama bahawa ia tidak terikat dengan perjanjian kolektif adalah tidak bermerit. Dalam apa jua keadaan dan bebas daripada s. 17(1) Akta, perayu pertama yang telah bersetuju melalui kl. 9 PJB untuk mengambil alih hak-hak dan liabiliti perayu kedua tidak boleh sekarang menyatakan bahawa ia tidak terikat dengan perjanjian kolektif.

Case(s) referred to:

Abdul Aziz Atan & Ors v. Rengo Malay Estate Sdn Bhd [1986] 1 CLJ 373; [1986] CLJ (Rep) 41 SC ***(refd)***

Ashbridge Investments Ltd v. Minister of Housing and Local Government [1971] 1 WLR 433 ***(refd)***

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Kesatuan Kebangsaan Wartawan Malaysia & Anor v. Syarikat Pemandangan Sinar Sdn Bhd & Anor [2001] 3 CLJ 547 FC ***(refd)***

Kesatuan Pekerja-Pekerja Perkayuan v. Syarikat Jengka Sdn Bhd [1997] 2 CLJ 276 CA ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***

Melon v. Hector Power Ltd [1981] 1 All ER 313 ***(refd)***

Nadarajah & Anor v. Golf Resort (M) Sdn Bhd [1991] 1 ILR 704 HC ***(refd)***
Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn Bhd [1976] 1 LNS 85 FC ***(refd)***
Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
Tanjong Jara Beach Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia [2004] 4 CLJ 657 FC ***(refd)***
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 CA ***(refd)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 17(1)(a), 30(5)
Rules of the High Court 1980, O. 53

For the appellants - Thavalingam Thavarajah (Raymond TC Low, Shaik Azrin Shaik Daud & Vinu Kamalanathan with him); M/s Lee Hishamuddin Allen & Gledhill
For the respondents - Ambiga Sreenevasan (Shireen Selvaratnam & Mohd Azri Mohd Ghazali with her); M/s Sreenevasan

[Editor's note: For the Court of Appeal judgment, please see Abdul Aziz Abdul Majid & Ors v. Kuantan Beach Hotel Sdn Bhd & Ors [2012] 1 LNS 1294.]

Reported by Suhainah Wahiduddin

JUDGMENT

Abu Samah Nordin FCJ:

[1] This appeal has its origin in the Industrial Court. Kuantan Beach Hotel Sdn Bhd (second appellant) was the registered owner of the lands in Telok Chempedak Kuantan where the hotel, known as Hyatt Regency Kuantan is situated. Alam Venture Sdn Bhd (first appellant) is the current registered owner of the said lands having purchased them together with the buildings thereon and all the assets from the second appellant. The respondents were former employees of the second appellant, who claimed to have been dismissed without just cause or excuse.

[2] The second appellant was then facing financial difficulty. Its lands on which the hotel is sited on had been subjected to foreclosure proceedings. Its shareholder, Pasdec Resources Sdn Bhd had been wound up. Thus on 25 April 2005, it executed a sale and purchase agreement ('SPA') with the first appellant to sell its lands and assets to the latter. Some of the terms of the SPA were later varied by way of two supplemental sale and purchase agreements executed between the parties, dated 11 November 2005 and 22 March 2006 respectively. We will revert to the relevant terms of these agreements later.

[3] On 23 August 2005, the second appellant was placed under receivership by the debenture holder, Am Merchant Bank Bhd and Pricewaterhouse Coopers was appointed as the manager and receiver of the second appellant.

[4] The respondents were represented by their union, the National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia ('the Union'). On 15 November 2005, the manager and receiver informed the Union that due to the second appellant's financial position, it was no longer a feasible option for the second appellant to continue its hotel operations and to remain in the hotel industry. It has no alternative but to sell its assets and to carry out a termination exercise.

[5] The respondents were in due course served with notices of termination which contained therein offers to pay them specified sums of money as "termination benefits and other payments" in accordance with the terms of their employment. The respondents acknowledged receiving the notices and payments offered to them.

[6] Nevertheless, they remained unsatisfied and took their case to the Industrial Court claiming that they were dismissed without just cause or excuse, in breach of the collective agreement entered into between the second appellant and the Union. In their claims, they sought to be reinstated without any loss of wages, allowances, service, seniority, privileges or benefits of any kind and/or such other order or alternative relief as the court deems fit and proper.

[7] The first appellant was added as a party by order of the Industrial Court.

[8] The Industrial Court, after a full hearing, dismissed the respondents claims against the appellants. The Industrial Court held that the second appellant had terminated the services of the respondents with just cause or excuse. In respect of the first appellant the Industrial Court held that it was not a party to the collective agreement and that the respondents were never employed by the first appellant and hence their services were never terminated by the first appellant.

[9] The respondents, being aggrieved by the decision of the Industrial Court, applied to the High Court for judicial review pursuant to O. 53 of the Rules of the High Court 1980 ('RHC') seeking the following orders:

(i) An order of *certiorari* to quash the award of the Industrial Court;

(ii) A declaration or order that the respondents were dismissed without just cause or excuse and that they be reinstated to their former positions in the hotel, now being operated by the first appellant without loss of salary and all other benefits or compensation *in lieu* thereof and backwages to be paid by the first and/or second appellants;

(iii) In the alternative, an order to remit the respondents' case to the Industrial Court to be heard *de novo* by a different chairman; and

(iv) In the alternative, an order of *mandamus* compelling the Industrial Court to order that the respondents be reinstated to their former positions in the hotel without loss of salary and all other benefits or compensation *in lieu* thereof and backwages to be paid by the first and/or second appellants.

[10] The Kuantan High Court dismissed the respondents' application for judicial review with costs. On appeal, the Court of Appeal allowed their appeal with costs, quashed the award of the Industrial Court, set aside the decision of the High Court and ordered that compensation and backwages be paid to the respondents, *in lieu* of reinstatement. The Court of Appeal made a further order that the matter be remitted to the Industrial Court for assessment of compensation and backwages to be paid by the first appellant. The appellants then applied for leave to appeal to this court against the decision of the Court of Appeal.

[11] On 28 August 2013, this court granted leave to the appellants to appeal against the decision of the Court of Appeal on the following questions of law:

(a) Whether an article of a collective agreement that seeks to result in the automatic transfer of employees from the present employer to another non-party of the collective agreement, without the consent of the non-party of the collective agreement and/or employees, can be enforced under the Industrial Relations Act 1967 and/or industrial law?; and

(b) Whether s. 17 of Industrial Relations Act 1967 applies only to ensuring the continuity of the terms and conditions of a collective agreement in the context of successors, assignees or transferees or can it apply to mandate a purchaser of asset and/or business to continue to employ the former employees of the asset/business seller?.

[12] It is therefore imperative to look at the reasonings of the courts below in arriving at their decisions before addressing the issues raised in the appeal before us. The central dispute between the contesting parties is on the proper construction of art. 2.4 of the collective agreement *vis-a-vis* the facts adduced before the Industrial Court. Article 2.4 of the collective agreement states:

> 2.4 In the event of the Hotel changing its name or of ownership or merging with other Companies, the validity of this Agreement shall continue to apply and that all the employees shall continue to remain in service to enjoy the same entitlements as contracted for

The first appellant is not a party to the collective agreement.

Before The Industrial Court

[13] After a full trial and evaluation of the evidence before it the Industrial Court came to the following findings of facts:

(i) It was the second appellant which employed and terminated the services of the respondents;

(ii) The first appellant was not the employer of the respondents;

(iii) The first appellant undertook to pay the termination benefits of the respondents pursuant to cl. 9 of the SPA;

(iv) All the respondents had accepted the termination benefits;

(v) There was no evidence that the second appellant had changed its name, ownership or merged with another company;

(vi) As at the date of the award, PricewaterhouseCoopers remained as the receiver and manager of the second appellant;

(vii) It was the said receiver and manager which sold the lands and assets of the second appellant;

(viii) The second appellant continued to exist although under the receivership;

(ix) The second appellant's business was sold to the first appellant as a going concern;

(x) The first appellant entered into a new management contract with the Hyatt Hotel Management Ltd;

(xi) The SPA did not contain a provision for the transfer of the employees of the second appellant to the first appellant;

(xii) The second appellant sold its lands and assets due to financial difficulty;

(xiii) There was no discrimination between the unionised and non-unionised staff in the termination exercise; and

(xiv) There was no privity of contract between the first appellant and the respondents.

[14] Based on those findings, the Industrial Court held that the second appellant did not breach art. 2.4 of the collective agreement. The Industrial Court found that the second appellant had acted in accordance with the Code of Industrial Harmony and established principles of law and was justified in terminating the services of the respondents as it had ceased its hotel business. In the result, the Industrial Court dismissed the respondents' claims against the appellants.

Before The High Court

[15] The High Court agreed with the findings of facts by the Industrial Court and its conclusion that the second appellant had terminated the respondents' services with just cause or excuse and that such termination was not in breach of art. 2.4 of the collective agreement. The High Court reiterated the principle that in a judicial review application the court's function is to decide whether the decision making process was done in accordance with the law. Judicial review is not an appeal from a decision but a review of the manner in which the decision was made and that the High Court is not entitled in an application for judicial review to consider whether the decision itself, on the merits of the facts was fair and reasonable: (*Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417]. The High Court ruled that the Industrial Court had not exceeded its jurisdiction and that it has no basis to intervene or set aside the decision of the Industrial Court.

Before The Court Of Appeal

[16] The Court of Appeal allowed the appellants' appeal, among others, on the following grounds. Firstly, it was inappropriate for the courts below to apply the strict and legalistic approach in construing art. 1 and art. 2.4 of the collective agreement in its literal meaning. It preferred the reasonable and pragmatic approach taken by the Court of Appeal in *Kesatuan Pekerja-Pekerja Perkayuan v. Syarikat Jengka Sdn Bhd* [1997] 2 CLJ 276 which held that ordinary rules of construction which necessarily involve a rather strict and legalistic approach, did not apply when interpreting a collective agreement, which is not a commercial agreement but a document dealing with far more basic issues pertaining to the livelihood of workmen. Parliament, in recognising the importance of providing a conducive working environment and promoting a harmonious relationship between the employer and the employees or workmen, had enacted s. 30(5) of the Act which enjoins the court to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

[17] Secondly, the courts below failed to appreciate that when construed as a whole, the SPA entered into between the first and second appellants in fact and law resulted in a change of the ownership of the business of the hotel within the meaning of art. 2.4 of the collective agreement. The word "Hotel" in art. 1 of the SPA refers to "Kuantan Beach Hotel Sdn Bhd trading as Hyatt Regency Kuantan". By applying the broad and pragmatic approach the Court of Appeal concluded that the word "Hotel" refers also to the business of the second appellant. The Court of Appeal had scrutinised the terms of the SPA and the supplemental agreements in their entirety *vis-a-vis* the evidence adduced before the Industrial Court and came to the conclusion that the hotel business of the second appellant was transferred as a going concern to the first

appellant. As such there was in law and in fact a change of ownership within the meaning of art. 2.4 of the collective agreement. There was continuity in the business of the hotel after the first appellant bought over the property from the second appellant, a fact which was confirmed by Dato' Anuarul Aini bin Mohd Perai, who testified for the first appellant. The hotel never ceased its operations and continued to be managed by the same management company under a new contract. Thus, the Court of Appeal held that the decision of the High Court in affirming the decision of the Industrial Court that there was no change of ownership was irrational.

[18] Thirdly, the courts below erred in holding that the first appellant was not bound by the collective agreement as it was not a party to it. The respondents contended that the first appellant was bound by the collective agreement as the successor assignee or transferee of the second appellant. The Court of Appeal held that the first appellant was bound by the collective agreement for two reasons:

(i) The first appellant had agreed to take over any liability of the second appellant by virtue of cl. 9 of the SPA; and

(ii) The first appellant was the 'successor assign or transferee' of the second appellant within the meaning of s. 17(1) of the Industrial Relations Act 1967 ('the Act'), relying on the decision of this court in *Kesatuan Kebangsaan Wartawan Malaysia & Anor v. Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 CLJ 547.

Decision Of This Court

[19] The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. In *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417 it was said that judicial review is not an appeal but a review of the manner in which the decision was made and the High Court is not entitled in an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable.

[20] In *Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn Bhd* [1976] 1 LNS 85; [1976] 2 MLJ 67 the Federal Court had made it clear that the Industrial Court was charged with findings of fact and "unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its findings of facts".

[21] The court may intervene on the ground that the decision maker had acted on no evidence or had come to a conclusion which on evidence it could not reasonably come: *Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183; *Ashbridge Investments Ltd v. Minister of Housing and Local Government* [1971] 1 WLR 433. It is now settled law that the courts may review the

decision of an inferior tribunal on the grounds of illegality, irrationality and possibly proportionality: *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, thus permitting the courts to scrutinise the decision not only for process but also for substance. In *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288 this court however clarified that not every case was amenable to judicial review pursuant to the principle in *R Rama Chandran*'s case. It should only be invoked in appropriate cases. There may be cases in which for reasons of public policy, national interest, public safety or national security it may be wholly inappropriate for the courts to attempt any substitution of views: *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; [1997] 1 MLJ 789.

[22] A decision of an inferior tribunal is amenable to judicial review where the facts do not support the conclusion arrived at by the tribunal or the findings of the tribunal had been arrived at by taking into consideration irrelevant matters or disregarding relevant matters: *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1.

[23] It is not in dispute that the second appellant had not changed its name or merged with another company. The central issue is whether the 'Hotel' has changed 'ownership' within the meaning of art. 2.4 of the collective agreement.

[24] The word 'Hotel' in art. 2.4 refers to 'Kuantan Beach Hotel Sdn Bhd trading as Hyatt Regency Kuantan' which is identified in art. 1 as a party to the collective agreement.

[25] Article 2.4 of the collective agreement clearly states that in the event the hotel changed ownership, the collective agreement remains valid and all the employees shall continue to remain in service to enjoy the same entitlements as contracted for.

[26] The problem arose when the respondents' employer, the second appellant, terminated the respondents' services after selling its land and the building thereon, including the hotel and other assets, to the first appellant. The respondents' claimed that they were dismissed without just cause or excuse and should be reinstated.

[27] The second appellant contended that it was not liable under art. 2.4 of the collective agreement as it had not changed ownership. It continued to exist although placed under receivership. The respondents contended otherwise. The Industrial Court and the High Court decided in its favour. On appeal, the Court of Appeal allowed the respondents' appeal, set aside the orders of the courts below, holding that the respondents were dismissed without just cause or excuse.

[28] Clearly, the disagreement between the parties is over the construction of art. 2.4 of the collective agreement. The Court of Appeal and the courts below, that is the High Court and the Industrial Court, arrived at different conclusions on the same facts before them because they differed in their approaches in the interpretation of the collective agreement.

[29] The High Court adopted a strict and legalistic approach and construed art. 2.4 of the collective agreement in its literal meaning. The Court of Appeal held that it was inappropriate to apply the ordinary rules of construction in interpreting art. 2.4 of the collective agreement, which is not a commercial agreement but a document governing the relations between the employer and the employees or workmen.

[30] The Industrial Relations Act 1967 was specifically enacted by Parliament to regulate the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade dispute and matters arising therefrom: See long title to the Act.

[31] Thus, in s. 30(5) of the Act the legislature in plain and simple language enjoins that the Industrial Court, in making the award "shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form".

[32] Our courts had, on numerous occasions expressed the views that such awards must be decided in accordance with s. 30(5) of the Act. Ordinary rules of construction do not apply in interpreting the terms of a collective agreement: See *Kesatuan Pekerja-Pekerja Perkayuan v. Syarikat Jengka Sdn Bhd*, *supra*. In *Tanjong Jara Beach Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia* [2004] 4 CLJ 657 the Federal Court once again emphasized that the Industrial Court in applying its powers under s. 30(5) of the Act has to bear in mind the underlying objectives and purposes of the Act, which is a piece of legislation to ensure social justice for both employers and employees and to advance the progress of industry by bringing about harmony and cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen against victimization by employers and to ensure termination of industrial disputes in a peaceful manner. Similar views had been echoed in the past: see for example, *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; [1995] 2 MLJ 753, *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747, *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314. Thus technical rules such as estoppel, limitation, laches, acquiescence (unless otherwise provided in the Act) have no place in industrial adjudication and they should not be allowed to be invoked to defeat claims which are just and proper: See *Nadarajah & Anor v. Golf Resort (M) Sdn Bhd* [1991] 1 ILR 704; [1992] 1 MLJ 506.

[33] We agree with the Court of Appeal that there was in fact a change of ownership of the hotel, within the meaning of art. 2.4 of the collective agreement pursuant to the sale of the hotel by the second appellant to the first appellant. As a result of the sale the hotel business, which was the core business, if not the sole business of the second appellant was transferred and taken over by the first appellant. Article 2.4 clearly states that in the event of a change of ownership, the collective agreement remains valid and shall continue to apply and that all the employees shall continue to remain in service to enjoy the same entitlements as contracted for. The hotel did not cease operations after being taken over by the first appellant. To ensure continuity of the hotel business, the first appellant entered into a new management agreement with Hyatt Hotel Management Limited on 27 January 2006, which was one day before the second appellant terminated its management agreement.

[34] It is provided in cl. 12(a) of the SPA, that the vendor (second appellant) shall give vacant possession of the property to the purchaser (first appellant) on the completion date and in that event the purchaser shall take over the whole hotel operations and shall bear all expenses and enjoy profits from the completion date. It is therefore obvious that the hotel business of the second appellant was transferred and taken over by the first appellant as a going concern. In a transfer as a going concern the business remains the same but in different hands: see *Melon v. Hector Power Ltd* [1981] 1 All ER 313 which was referred to in *Abdul Aziz Atan & Ors v. Rengo Malay Estate Sdn Bhd* [1986] 1 CLJ 373; [1986] CLJ (Rep) 41. The High Court construed art. 2.4 of the collective agreement in its literal meaning when it held that the second appellant had not changed ownership and continued to exist by the same name even after selling its property to the first appellant. It did not consider the change of ownership of the hotel as a change of ownership within the meaning of art. 2.4 of the collective agreement. Such an interpretation of art. 2.4 would not be in accord with s. 30(5) of the Act. It must not be forgotten that the respondents, who were employees of the second appellant, were actually employed to work at the hotel which had been taken over by the first appellant.

[35] By cl. 9 of the SPA the first appellant has contracted to assume the rights and liabilities of the second appellant.

Section 17 Of The Act

[36] Section 17 of the Act states:

> (1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on -
>
> (a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and

(b) all workmen who are employed or subsequentlyemployed in the undertaking or part of the undertaking to which the agreement relates.

[37] Section 17 of the Act had been judicially considered by this court in *Kesatuan Kebangsaan Wartawan Malaysia & Anor v. Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 CLJ 547.

[38] In that case, the collective agreement in question was between Kesatuan Kebangsaan Wartawan Malaysia (first appellant) and Sin Poh (Star News) Amalgamated Malaysia Sdn Bhd ("Sin Poh") which was given the permit to publish the newspaper, Sin Chew Jit Poh Malaysia. On 3 September 1987, Sin Poh was placed under receivership. On 28 October 1987, the minister cancelled the permit. On 23 March 1988. the minister issued the permit to publish the same newspaper to Syarikat Pemandangan Sinar Sdn Bhd (first respondent), which then reemployed 85% of Sin Poh's employees. On 6 April 1988, the receiver and manager of Sin Poh entered into a sale and purchase agreement with Syarikat Rimbunan Hijau Estate Sdn Bhd (second respondent) and sold all the physical assets of Sin Poh to the latter.

[39] The first and second respondents were not parties to the collective agreement. The Industrial Court held that they were successors assignees or transferees of a party to the collective agreement and bound by it. The High Court agreed with the Industrial Court. The Court of Appeal held otherwise. Leave to appeal to the Federal Court was granted as to whether the first and second respondents were successors, assignees or transferees of Sin Poh under s. 17(1)(a) of the Act. The Federal Court held that the first and second respondents were bound by the collective agreement as successors, assignees or transferees of Sin Poh. The Federal Court reasoned that the provision of the Act (ie, s. 17(1) "cuts across the law of contract" and that its rationale is one of "continuity of the collective agreement" from the original parties and members of the union to their successors, assignees or transferees in order to ensure that the rights and obligations of the parties are preserved by those taking over.

[40] The first appellant's contention that it was not bound by the collective agreement was therefore without any merit. In any event and independently of s. 17(1) of the Act, the first appellant which had agreed by cl. 9 of the SPA to assume the rights and liabilities of the second appellant cannot now say that it is not bound by the collective agreement.

[41] It appears that the two questions of law posed to this court are basically questions relating to the construction of an article in the collective agreement and a provision in a statute. The first question is on the construction of art. 2.4 of the collective agreement which had to be decided

on the peculiar facts adduced before the Industrial Court. The answer to the question would be dependent on the facts of the case. In the case before us there was a change of ownership within the meaning of art. 2.4 of the collective agreement. Thus the parties are bound by it.

[42] The second question is on the construction of s. 17(1)(a) of the Act, which had been judicially considered by this court in *Kesatuan Kebangsaan Wartawan Malaysia & Anor v. Syarikat Pemandangan Sinar Sdn Bhd & Anor*, *supra*. In that case, the first and second respondents were not parties to the collective agreement, but were nevertheless held to be bound as the successors, assignees or transferees of the party to the collective agreement within the meaning of s. 17(1)(a) of the Act. The ultimate decision of whether the purchaser is a successor, assignee or transferee within the meaning of s. 17(1)(a) of the Act would be dependent on whether it can be established that the purchaser is a successor, assignee or transferee. In the instant appeal, there is no doubt that the first appellant was the successor, assignee or transferee of the second appellant in the context of s. 17(1)(a) of the Act. Accordingly, we dismiss the appeal by the appellants with costs.

[43] We note that the Court of Appeal had ordered that the case to be remitted to the Industrial Court for assessment of compensation and backwages due to the respondents *in lieu* of reinstatement without taking into account that they had accepted the termination benefits offered by the second appellant. Therefore whatever amount of termination benefits which had been paid and accepted by the respondents shall be taken into account in assessing the amount of compensation and backwages due to them.